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Defamation and reputation in the Australian press

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Abstract

This paper reports on a comparative study of four types of Australian newspapers' coverage of defamation and related issues. This was part of the National Defamation Project conducted at the Communications Law Centre in Sydney, 2002-2005¹. It was found the press gave limited coverage to defamation, focusing on court cases and newsworthy personalities' reputations, and provided scant contextual background about defamation issues. However, the media's often satirical reporting of prominent cases, and its populist discourses generally, can be argued to have liberalised attitudes to reports of potentially defamatory personal behaviours and "lifestyles" (such as sexual orientation). Current Australian law fails to reflect public attitudes as indexed by the press. Culturally, the distinction between private morality and public virtue is breaking down. Reputation is a narrow concept in the press, and increasingly appears to be an asset only of those who are already rich or famous.

The problem of defamation

At the beginning of 2006, only a few days after the death of Kerry Packer, several defamation law reforms became operative in Australia. *The Sydney Morning Herald* noted these changes, and Richard Ackland commented (2006): "The new, new thing is that we're back to full-length jury trials ... (rather than a split procedure that) ... ended up being a minefield of technicalities, appeals, retrials and immense expense." Judges, not juries, will, in future, determine general damages, which are to be capped. Yet suing for defamation is likely to remain an option more or less exclusively open to the already rich and famous, if the concept of "reputation" which defamatory imputations supposedly "lessen" in the eyes of the "ordinary reasonable person" continues to reflect cultural stereotypes of power and celebrity that are the currency of the popular media. Defamation law presupposes that individual citizens "possess" a reputation, moral or professional, and that this is an objectively assessable asset.

Only a minor part of the larger research project is discussed in this paper. This focuses on how the press constitutes cultural meaning around the concepts of reputation and defamation. Is the concept of “reputation” as the law and the media assume? What does it mean to “have a reputation” in the current media/cultural context? If reputation is a cultural-legal “fiction”, is it likely that press representations contribute to, or construct, the very notion of reputation that is at stake in defamation litigation? Although it cannot be directly addressed, it can also be asked: If knowledge of defamation law and practice depends entirely on the media (as it must, for most people), what kind of knowledge might the accumulated press coverage present? And, finally, what do the media assume about the public’s acceptance of changing moral, ethical or professional values and attitudes (which may be at stake in defamatory reporting)?

Do the media self-censor? Are they cautious or conservative, inhibited by the possibility of legal action should they imply or allege defamatory criticism of citizens? Reporting may reflect the “silencing” or “chilling” effects of the law on the media. This may have been compounded in Australia by the lack of uniformity across federal and state jurisdictions. Dent and Kenyon (2004) compared United States with Australian press reports, quantifying those that could be judged to include potentially defamatory allegations against public and political figures. Because US and local laws “strike different overall balances between reputation and free speech”, Dent and Kenyon concluded that the chilling effect would be reflected in different frequencies of published articles which “appeared to be defamatory” in each national jurisdiction. They concluded:

[T]he sample of US articles contained allegations which appeared to be defamatory, at nearly three times the rate of the Australian sample. Second, the balance between allegations against political or corporate figures was very different in each country, and the Australian media may be less comfortable making allegations against corporations and corporate figures than its US counterpart. Third, the range of commentary within US articles included far more extreme material than the Australian sample. (Dent & Kenyon, 2004, p. 5)

Dent and Kenyon see these differences as indicating that the Australian law “may well have a chilling effect on media content”. One implication of these findings may be that, in Australia, the commonly held assumption concerning legally defensible “reputation” itself is relatively narrow, centred on private morality more than on public or corporate ethical or professional values. Ironically, compared with the US, Australia may have fostered a more privatised and individualistic/moral rather than professional/ethical emphasis in popular understandings of reputation.

Framing reputation and its discontents

Pearson and Brand (2001) note that new media are seen by most researchers as significantly influential in three ways: they set the agenda of issues, giving prominence to some and not others and, to some extent, set up the linguistic categories that label and frame the agenda items and influence both the public and other media who re-publish authoritative sources. Newspapers are seen as the most influential medium in the news products of other media such as television (p. 8). This is consistent with the assumption that newspapers "break" news, set the major political agenda and provide more complex and detailed reporting and "editorial" (opinion) than do television or radio (McQuail, 2000). Newspapers constitute the detailed background or standard agenda to which other media refer for comparison with their own output. Newspapers are frequently cited as a source in reports in other media (for example, "A poll released by *The Australian* today shows...")

The press is not best understood as having direct, strongly deterministic influences on individuals' opinions or knowledge, but instead as exerting more indirect influence on how people think about issues, and on what they are concerned about (McQuail, 2000; Kidd-Hewitt & Osborne, 1995). Bell (1991, pp. 238-247) argues that audiences and readers recall few specific facts from individual media stories. On complex issues about which only media-circulated information is available to, or accessed by, the majority, considerable misunderstanding of the issues in the news report may result. Bell studied public knowledge of climate change, concluding that: "All informants who knew anything about (climate change) cited the principal daily media as a source of their information." (p. 239) Like defamation, climate change is a complex issue, and Bell's finding that people's sole reliance on the media did not result in technically detailed or systematic understanding is salutary. Adding these observations to the findings of Dent and Kenyon (2004), it might be expected that popular knowledge of defamation laws and remedies, of jurisdictional differences and of what constitutes "reputation", will be very unreliable and partial. Furthermore, research by Grimes (Gibbons et al, 2003) suggests that, at least in the case of television news reports, viewers often erroneously recall contested defamatory allegations or speculations as though they were true or actually defamatory. Grimes calls this "unintentional defamation". Audiences forget or do not notice the verbal qualifications in news reports that reporters use to protect themselves from accusations of defamation. Unlike crime reporting, the coverage of an abstract area of litigation such as defamation has no obvious, easily mobilised "newsworthiness". Crime reports engage moral, psychological and social drama, and generally assume a public consensus. Readers tend to accept the frameworks of interpretation by which the press reports crime and punishment and, indeed, may be easily moved by the press to its point of view concerning the judiciary and the nature of crime prevention and deterrence (Cowdrey, 2001). Because crime generally involves little definitional con-

tention, has identifiable victims, and is the stuff of fictional and factual drama, readers generally agree with the media about what constitutes a crime or alleged crime, and have strong ideas about legal sanctions. Defamation is necessarily more technical and has no victim save the plaintiff whose suffering is in contention in the courts. Moreover, the "villain", not just the "victim", is often difficult to identify, being a corporation or an individual not necessarily well known to the public.

Defamation and related issues in the Australian press, 1990-2003

The National Defamation Project of which this report is part surveyed public attitudes to various kinds of potentially defamatory imputations based on actual cases from Australian law during the past decade (for example, Baker, 2004). This report presents a non-technical summary of the study of 923 items published on defamation and related issues during the period 1990-2003, in four Australian newspapers. Among the questions addressed were: How do different kinds of Australian newspapers present defamation, and attitudes to the moral and professional imputations at stake in the courts? How does the press characterise "reputation"? For example, are some classes of defamation cases more frequently and fully reported than others? What opinion or editorial coverage is given in different types of newspapers? The evidence from the analysis suggests answers to other questions often raised in discussions of defamation law reform: Is there evidence that defamation laws inhibit reporting? Do the press exhibit any conflicts of interest in their reporting? Do they ignore or rarely report cases that do not involve publicly well-known litigants? Are different newspapers concerned with different allegedly reputation-threatening kinds of behaviours (for example, personal sexual morality, rather than professional incompetence)?

Newspapers analysed

The National Defamation Project content-analysed all relevant articles published from 1990-2003 in four high-circulation newspapers. The choice of newspapers allowed comparisons between broadsheet quality papers, tabloids from different states (one the most populous, the other the least densely populated), and publications from two major presses, News Limited and John Fairfax Holdings. The papers studied were *The Sydney Morning Herald*, *The Australian*, *The West Australian* and the *Daily Telegraph*². A total of 923 items covering defamation cases, issues and controversies was analysed. These constituted all relevant reports, from 1990, in the four newspapers:

Table 1: Newspaper articles analysed

| Newspaper | n | % |
|----------------------------------|-----|-------|
| <i>The Sydney Morning Herald</i> | 278 | 30.12 |
| <i>The Australian</i> | 394 | 42.68 |
| <i>Daily Telegraph</i> | 226 | 24.49 |
| <i>The West Australian</i> | 25 | 2.71 |
| Total | 923 | 100 |

Several genres of published articles were distinguished. These, and the observed frequency of each, were:

Table 2: Genres of published articles analysed, all papers

| Type of article | n | % |
|------------------------|-----|-------|
| News report | 627 | 67.93 |
| News feature | 112 | 12.13 |
| Section feature | 19 | 2.06 |
| Lead article/editorial | 96 | 10.4 |
| Opinion piece | 41 | 4.44 |
| Cartoon | 3 | 0.33 |
| Other | 25 | 2.71 |
| Total | 923 | 100 |

News reports typically covered the daily proceedings in particular (usually prominent litigants') cases, and constituted two-thirds of all relevant press material. Defamation issues were relatively high on the agenda addressed by newspapers in editorial commentary and feature articles. Combined, such articles made up 22 per cent of all published articles on defamation. It may be concluded that the press itself reflects on defamation very frequently; the press reflects on or backgrounds defamation issues one-third as frequently as it reports "hard news" stories about current cases.

Approximately 16 per cent of items about defamation, across all newspapers combined, were given the prominent position in their respective publications of pages one, three or special sections.

Table 3: Prominence of defamation-related articles, all papers

| Page | n | % |
|-----------------|-----|-------|
| Page 1 | 48 | 5.2 |
| Page 3 | 90 | 9.75 |
| Opinion page | 6 | 0.65 |
| Special section | 6 | 0.65 |
| Other page | 773 | 83.75 |
| Total | 923 | 100 |

Newspapers compared

Comparison of the newspapers shows that the kinds of defamation articles published in each differ in important respects: the tabloid *Daily Telegraph* published no special features or editorials on the topic in the period studied. By contrast, *The Australian* published 96 such reflective or contextualising articles, almost 25 per cent of its total. Journalists' bylined opinion pieces rather than editorials were the genre chosen by the *SMH* to reflect on, and opine about, defamation.

Table 4: Genres of report, all newspapers

| | <i>SMH</i> | | <i>Australian</i> | | <i>Telegraph</i> | | <i>West. Aust.</i> | |
|-----------------|------------|-------|-------------------|-------|------------------|-------|--------------------|-----|
| | n | % | n | % | n | % | n | % |
| News report | 181 | 65.11 | 231 | 58.63 | 195 | 86.29 | 20 | 80 |
| News feature | 48 | 17.27 | 96 | 24.37 | 26 | 11.5 | 3 | 12 |
| Opinion piece | 22 | 7.91 | 35 | 8.9 | 4 | 1.77 | 1 | 4 |
| Other | 20 | 7.2 | 17 | 4.3 | 1 | 0.44 | 1 | 4 |
| Section feature | 6 | 2.15 | 13 | 3.3 | 0 | 0 | 0 | 0 |
| Cartoon | 1 | 0.36 | 2 | 0.5 | 0 | 0 | 0 | 0 |
| Lead/editorial | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Total | 278 | 100 | 394 | 100 | 226 | 100 | 25 | 100 |

It is notable that *The Australian* published more editorial than the Sydney broadsheet, but the *SMH* gave opinion pieces on defamation greater prominence than did the other newspapers. Tabloids reflected on the issue rarely.

Different agenda, different newspapers?

All articles were classified according to the principal topic nominated in their first three paragraphs. Generally slight but in some cases significant agenda differences can be seen when newspapers are compared³. The *Daily Telegraph* focused more frequently on witness testimony and was much less interested in legal contexts, backgrounds and the histories of cases, in legal reform, and in discussing the court system, than were the broadsheets or *The West Australian*. The Sydney tabloid emphasised the plaintiff as the subject of its stories. However, both the *SMH* and *The Australian* gave considerable prominence to plaintiffs' arguments and to profiling their backgrounds or biographies. *The Australian* and *The West Australian* were the most concerned of the four newspapers with defamation law reform, while all gave roughly equal prominence to detailing damages and to explaining courts' decisions in particular cases. So a profile of prioritisation of defamation "topics" emerged for the

most popular tabloid. It was interested in the plaintiff, in testimony and pleas, in procedures and damages. Surprisingly, the *SMH* was quite similar (which perhaps reflects Sydney concern with local scandal and reputation). Generally, newspapers reported plaintiffs' pleas and arguments about twice as frequently as they reported "for" the defence, which in many cases was themselves. Second, many reports (25 per cent plus) covered witness evidence and procedural matter in the courts.

Reports dealing with plaintiffs' arguments tend to assume, as do all genres of report except those classified in this research as reform-oriented, that the imputation at issue in a particular case is injurious to reputation, or could be seen as such. Even if the plaintiff fails, reports circulate proceedings about damage to reputation which names an imputation, but never questions whether the general class of behaviours of which the imputation is an instance is one that ordinary reasonable people (readers) could find defamatory. The stories that unfold (stories told in many instalments) are about the adequacy of the defence, not about whether community attitudes are likely to support the view that the plaintiffs would be injured by an imputation. Once a case goes to court, the question becomes (at least in virtually all news reports) whether, in this case, damage was likely. It is not about whether in this case, at this time, in this social/cultural context an imputation, even if proven, would be judged by most, or many people to bring a person into disrepute. What the reading public never sees are the cases that never reach court. If reported at all, these are described briefly and in formulaic language that frequently fails to say whether damages have been paid or other remedies agreed. So media reports tend to assume that "public opinion" is as the plaintiff asserts. The courts concern themselves with the particular contexts of the respective cases, and the media accept the assumed definitions of the grievance made even if it is contested in court.

Prominence

The broadsheets gave much greater prominence to defamation issues than did the tabloids: 20 per cent of the former but only 4-6 per cent of the latter reports were given page one or page three prominence.

Table 5: Prominence of defamation items in all newspapers

| Newspaper | <i>SMH</i> | | <i>Australian</i> | | <i>Telegraph</i> | | <i>West. Aust.</i> | |
|-----------------|------------|------|-------------------|------|------------------|------|--------------------|------|
| | Total | Rank | Total | Rank | Total | Rank | Total | Rank |
| Page 1 | 16 | 3 | 26 | 3 | 6 | 3 | 0 | 3= |
| Page 3 | 27 | 2 | 55 | 2 | 7 | 2 | 1 | 2 |
| Opinion page | 6 | 4= | 0 | 4= | 0 | 4= | 0 | 3= |
| Special section | 6 | 4= | 0 | 4= | 0 | 4= | 0 | 3= |
| Other number | 223 | 1 | 313 | 1 | 213 | 1 | 24 | 1 |
| | 278 | | 394 | | 226 | | 25 | |

Mention of juries, jurisdictions and defences

The reading public is unlikely to understand the complexities of differing Australian jurisdictions, the issues of whether juries sit on defamation cases, the conditions pertaining to appeals, or the role of juries (or the number of jurors) in particular courts. News reports are unlikely to enlighten them on such technical matters: 80-88 per cent of reports did not indicate, for instance, whether a case was heard before a jury, although *The Australian*, given that it is likely to report on several state and territory jurisdictions, was the most likely to mention juries (which it did in 20.5 per cent of its reports). The *Daily Telegraph* mentioned juries 16 per cent of the time, but the *SMH*, at 15.5 per cent, and *The West Australian*, at 12 per cent, were marginally lower. Many reports (40 per cent) did not name the jurisdiction of the case being reported. Only 18 per cent of reports mentioned juries, so the readers of news articles would generally be unaware of this feature of a case. It would hardly be surprising, then, if the public was ignorant or confused about the role of juries in defamation cases, and about other technical/legal aspects of the processes involved, let alone of the fact that several jurisdictions were available. (These issues have been addressed in 2006 changes to federal defamation law.)

Although reports usually gave space to describing plaintiffs' claimed grievance, only 21 per cent indicated the nature of the defence(s) being mounted, even though in many cases these were being made by the very news medium publishing the report. Defences are a complex issue, and the claim by the defendant publisher of "truth" is not sufficient in many cases, so more than one defence may be made, such as "public interest", "privilege" or "fair comment". Newspapers did not attend to these subtleties in more than one case in five. *The Australian* was much more likely (34.5 per cent of items) than other papers to nominate the nature of the defence proposed in defamation cases. The others ranged between 13 per cent (*SMH*) and 4 per cent (*West Australian*). This may reflect the cases of national interest that the national daily chooses to report, but despite this it is still valid to conclude that newspapers offer their readers little "education" concerning the range or nature of defence available to the media under Australian law. It may well be that even well-informed members of the public assume that, in the absence of media references to defences, "truth" is always and only at issue in defamation cases. If so, and if the media generally uncritically accept that contested imputations do reflect community moral attitudes (otherwise, why are they at issue in the courts), then press reporting is likely to contribute to ignorance about defamation.

Newsworthy plaintiffs: which reputations matter?

The general prevalence of news articles that arise from the newsworthiness of prominent celebrities and public figures is discussed below. It is already newsworthy people who are the most newsworthy plaintiffs, and their court proceedings overwhelmingly dominated reporting in Australian newspapers in

the period studied. An avid reader could be forgiven for believing that only political, "business" (very wealthy business), "showbusiness"/media or sports "personalities" (to use the media's jargon) possess what the law defines as "reputations". Whether or not there were other important legal actions during the period under review, the cases that reached readers almost invariably involved a name likely to be widely recognised by the Australian public. These included the internationally litigious, such as Elton John, Jeffrey Archer, Paula Yates, David Lange, John Major and the McDonald's restaurant franchise company. The most reported cases (to the extent this can be quantified by counting items and ignoring their prominence or salience) were: John Marsden (reflecting the Sydney bias of the study); Abbott/Costello; Jeffrey Archer (UK politician, author and criminal); Andrew Theophanous (these two cases involving prominent federal politicians and, in the former case, sexual scandal and a cast of "colourful" characters); Andrew Ettingshausen (footballer/model); Richard Carleton (Channel 9 reporter); and David Lange (former NZ Prime Minister). It should be noted, however, that Marsden and Theophanous, especially the latter, were not reported frivolously or cynically. Other public figures did attract such reports (see below).

If defamation cases make the front page (or page three), it is the plaintiffs' biography and/or their testimony that is given most prominence, followed by stories highlighting the nature (especially the dollar value) of damages. Pages one and three are generally regarded as the "most-read" pages of newspapers so, unsurprisingly, the high salience of the most conventionally personalisable reports means that many were found there. Up to one in five reports concerning plaintiffs, and up to one in six concerned with damages, were published on page one, with similar numbers found on page three. Generally, however, defamation is not highly newsworthy, as indicated by its low level of prominence and position, and it was generally not given the top or right-hand side of layouts (highest salience, Kress & van Leeuwen, 1996). Defamation is newsworthy when people engaged in legal actions that invoke it are already newsworthy or in the public domains of politics, entertainment, sport or business. Such news value is heightened if the case concerns sexual morality or conveys overtones of hypocrisy, whether in relation to sex or not. Except for rare mentions in leader articles, papers were silent on whether reported behaviour should be seen by the courts as inconsistent with community norms, and about whether, even if it were outside such norms, an imputation would be judged defamatory. Newspapers did not assume that any particular imputations would necessarily be judged defamatory; indeed, they responded to such claims rather than providing an empirical index of their injuriousness "in advance".

Framing defamation issues

The West Australian framed its limited coverage more critically and analytically than did the comparison publications. Relative to its few reports, *The*

West Australian most frequently focused on defamation law itself (25.6 per cent). The *Daily Telegraph* seldom reflected on the law, although all papers focused frequently on courts and their procedures and occasionally on technicalities of litigation (10-18 per cent). A range of interpretive frameworks was visible, with "quality" journals, especially, interested in linking reports of particular cases to information and/or opinion concerning "freedom of the press" (and the "silencing effect") or to the cynical exploitation of defamation law by celebrities and politicians. Approximately one-quarter of all articles named defendant media organisations.

Very few stories interpreted defamation issues as tales of the powerless, ordinary "underdog" triumphing over Fairfax or Murdoch. Newspapers' populist sympathies were more likely to motivate stories framed to present powerful or rich plaintiffs in conflict with disadvantaged media defendants. In adopting these frameworks, the media reinterpreted populism in narrow ways, mostly ignoring the "battles" of the unfairly besmirched, ordinary citizen (a strong stereotype in other consumerist frameworks). Instead, the media themselves were likely to be shown doing battle with powerful, cynical lawyers and the law.

It is clear from the headlines that the tenor of many reports conveys a flippancy or cynicism about the motives of litigants. The contested imputations in such reports are not seen as genuinely damaging to litigants' reputations. For example, reports of Jeff Kennett's action: it is doubtful if the ex-Premier of Victoria's adultery would bring him into disrepute. Sub-editors' cynicism may well be justified, however, given actual community attitudes to sexual morality and the "third-person effect" showing that a majority of "ordinary reasonable persons" think that others but not themselves will judge publicised sexual immorality as injurious to reputation (Baker, 2004).

If reports focused on court cases and litigants' backgrounds tended to the satirical, broadsheets nevertheless published many opinion pieces, including editorials, that analysed and critiqued defamation law and practice.

The scandalous case; the populist response

Defamation cases make great news stories. After all, they come with their own sense of scandal. Claim and counter-claim are enthusiastically reported by media outlets who (sic) know that getting a peek inside the lives of celebrities is a sure-fire way to sell more newspapers and improve TV ratings. (O'Regan, 2004)

Headlines are generally tendentious, and often interpret and judge. Many give concrete visual or verbal images to summarise their interpretation of an event or issue. In defamation reporting, the interests of the media in dissuading the aggrieved from future litigation seem to colour the frequently satirical lam-

pooning of plaintiffs, especially public (for example, political) figures and "celebrities" (entertainers, sportspeople, the rich and privileged). "Crucified in Jerusalem, Mrs Costello's agony" uses mock-serious religious reference sarcastically to belittle the plaintiff's claimed suffering as a result of a defamatory passage in Bob Ellis' book. Rather than being a special case, the cynicism and ridicule with which the Australian press reported Abbott and Costello's action against Random House author Bob Ellis is typical. Indeed, most of the most publicly visible cases in the past 15 years have been presented as though the plaintiffs' reputations were not seriously at issue in the initial media coverage that provoked the legal action. Consider a selection of published headlines over Abbott and Costello vs Random House reports:

| | |
|---|-------------------|
| Crucified in Jerusalem, Mrs Costello's agony | October 20, 1998 |
| Enter Hayden, witness for the prosecution | October 22, 1998 |
| With a burp and a snort the author has his day in court | October 22, 1998 |
| Bitter harvest | October 23, 1998 |
| Wild Bill Hiccup in this wilderness | October 23, 1998 |
| The 33 words that sank Jerusalem | October 24, 1998 |
| Hot-air clouds in egosphere | October 24, 1998 |
| Caesar's wife now fair game | October 24, 1998 |
| Ellis scotches rumour with dry roast | October 31, 1998 |
| After the break, who's playing Banquo now? | November 10, 1998 |
| A daily diet of scorn and derision | November 14, 1998 |
| Pulp friction | November 27, 1998 |
| Pulped fiction | March 7, 1999 |
| Sound and fury of the icons | March 10, 1999 |
| Supermen stride our great divide | March 13, 1999 |
| Civility lacking in civil society | March 20, 1999 |
| Publisher shelves Ellis | March 14, 2001 |

These use mock-heroic rhetoric, sarcasm, puns, hyperbole and jokey allusions to popular culture and cartoon figures. Taken together, they suggest that the press sees plaintiffs as cynically acquisitive and the legal process as Gilbertian farce. "Hot-air clouds the egosphere" encapsulates these satirical modes. The issue at stake, reputation relating to sexual morality, is not seen as a serious matter. The press appears to share majority cynicism and consolidates this in vernacular imagery and figurative meaning. It is likely that such modes of reporting, which were as notable in the qualities as in the tabloids, would help liberalise public attitudes to contested imputations.

Cynicism and humour also demean international litigants such as McDonald's and Jeffrey Archer:

Big Mac pays high price for win over small fries

Big Mac's bunfight: Day 231

Last among equals: Archer found fibbing

Even homophobia was given alliterative jokiness in "Hounds of homophobia howl at Blair's Cabinet" (Jason Donovan vs *The Face* magazine). Footballer Andrew Ettingshausen's suit regarding his visible penis also provoked derision. Even day-to-day reports of John Marsden's saga against Channel 7 were sometimes facetiously framed:

Ghosts of mateship past

A legal walk on the Wilde side (sic)

Another "high-profile" case, Theophanous vs Herald and Weekly Times, unexpectedly provoked the headline: "When polly wants a cracker" (punning on slang for politician).

To conclude: public figures who sue for defamation, even when a most serious imputation (such as corruption or paedophilia) is at stake, may be ridiculed through the rhetoric of newspaper headlines. By contrast, papers do not make fun of people allegedly involved in fraud, paedophilia or corruption, even when the accused are public figures, although a Hollywood celebrity like Michael Jackson might be so ridiculed in an Australian publication. Jackson's 2004 case is revealing:

| | |
|---|----------------------------------|
| Wacko Jacko sues for millions | March 26, 2004 <i>Herald Sun</i> |
| Wacko Jacko foolish | March 31, 2004 news.com.au |
| I'm no wacko says angry Jacko | August 22, 2004 <i>The Age</i> |
| Coalition MP compares Latham to 'Wacko Jacko' | February 18, 2004 abc.net.au |

A possible consequence of such tendentious headlines is that the press further brings the plaintiff into disrepute, either individually or as a representative of an interest or profession. Hence, the public's attitudes to the imputations at stake may be affected, presumably in the more liberal direction. The media themselves change rapidly, and how reputation, morality and social values change is reflected in this.

An increasingly populist press

In considering the complex relationships between the press and its various readerships, it should be noted how interdependent journalists and their audiences/readers are, despite the fact they may know very little about each other. "Assuming that audience membership usually signifies approval of communicator style, it follows that the media attract audiences which suit them. If the communicator is unsuccessful in accommodating to the audience, the audience

will do the accommodating.” (Bell, 1991, p. 107) As Bell intimates, newspapers “design” their audiences through visual style, verbal registers and the selection or highlighting of news topics, for example. They nominate subjects, persons and events and address their readers about them in distinct (yet continuously changing) ways. *The Australian* can use headline phrases such as “Caesar’s wife” (Abbott and Costello vs Random House) or name without explanation “Ellis” (Bob Ellis the writer) or “Hayden” (ex-ALP leader), and assume general audience recognition. These nominations are neither deferential nor formal. The *Daily Telegraph* can call stockbroker the late Rene Rivkin “Rene”, or footballer Andrew Ettingshausen “ET”, and assume egalitarian complicity with its readers. “Rene” and “ET” are represented as sufficiently “like us” (the assumed readers) to invite empathy with their media-induced discomfort.

The various ways by which both “quality” and tabloid newspapers assume linguistic and therefore social familiarity and equality with their assumed readers, however, has changed radically in Australia during the period studied in this defamation project. While there is a much greater “social distance” in the formality of the language of broadsheets than in the vernacular of the tabloids (Bell, 1991, p. 109), both kinds of journal have become increasingly populist and magazine-like during the past decade through proliferating “lifestyle” and consumer supplements, increased humour and/or opinion columns. Driven by demographic changes (a younger, more ethnically diverse, although slowly shrinking, readership), newspapers were much more populist-consumerist at the turn of the 21st century than a decade earlier. Colour photography, banner headlines, personalisation and, especially in the tabloids, explicit “sensationalism” had increased the entertainment-to-information ratio in all newspapers (Pearson & Brand, 2001, pp. 53-194).

The press increasingly speaks on behalf of, not just about, its readers, seeing its role as representing their interests against those in power, against injustice, pain, suffering and humiliation – in short, the press (with current affairs television and commercial radio) often speaks for the ordinary, powerless public or citizen. It shows such populist concern in the implicit and explicit advocacy of the rights of those aggrieved by the bureaucracy, the professions, “big” business and government agencies. Populist discourse is replete with vernacular, often satirical, references to public figures and the powerful on the one hand, and to “mums”, “dads”, “battlers” and victims on the other. Populism is also found in opinion pieces and news features that expose the effects of power on the ordinary person, often seen as a “consumer” of the political system, and on whose behalf the media try to “keep the bastards honest”. A common theme has emerged in the past decade: tabloid and quality newspapers highlight how the forces of egalitarianism and fair-mindedness (the Aussie “fair go”) confront hierarchical, elite power (corrupt insurance companies, poor schools, greedy banks, uncaring social welfare personnel, out-of-touch politicians, lawyers, courts and judges).

Changing concepts of private morality and the popular press

It was found that the social attitudes surveyed in the Defamation Project (Baker, 2004) are much more "liberal" than Australian jury verdicts. This is not surprising if one examines the implicit acceptance in public conversations conducted through the media of many previously stigmatised or "taboo" behaviours (including previously criminal behaviours such as conducting abortions or homosexual acts). Only adultery and dishonesty about it were judged by a majority of respondents in the National Defamation Project survey to be defamatory. Other private behaviours, including homosexuality and promiscuity, were not seen by a majority of interviewees as likely to make them "think less" of the person who so behaved. It needs to be remembered, of course, that the "third-person effect" was quite strong in many of the imputations surveyed in that research. It is possible to detect in the media's reporting of defamation cases that involve allegations or imputations of personal immorality, the same "double standard" reflected in this effect. Journalists seem to find newsworthy precisely those kinds of cases that loom largest in the attitudes reflected in the third-person effect (especially sexual immorality).

The press and electronic media's interest in defamation can also be understood in relation to the rapid increase in what some have called "first-person media", centred on "life politics", "emotional democracy" and "identity politics" (Barker, 2000). Confessional and testimonial television and populist press articles about ordinary people in everyday situations explore personal identity and ethical and moral questions that were once considered private or "gossipy" by the quality press. Nowadays, the *SMH* and *The Australian* publish magazines that discuss just such issues. These suggest that many of the representations that could be seen as defamatory (around sexuality, parentage, morality) are no longer generally, and certainly not universally, labelled as "deviant", "immoral" or dangerous. They are not often judged as indicating weakness of character or personal failure (for example, admitting to contemplating or attempting suicide, choosing to have an abortion). The media's evolving populism is coupled with an increasing focus on personal/moral issues, on "life politics" arising out of the breakdown of traditional families, and of the once-stable distinction between the public and the private. In Australia, the media have led the discussion of such increasingly relativistic and liberal attitudes to moral issues. It is the media that must sell to people who, in their daily lives, struggle with the very dilemmas that were once judged unambiguously in terms of authoritative moral precepts, rather than as "identity" or lifestyle issues.

The laws of defamation derive from, and assume, relatively stable, authority-based precepts, violations of which, by definition, constituted damage to the reputation of an accused. But current media values may be out of step with what the law assumes. The 1990s was a decade during which many gay men and women publicly acknowledged their sexual orientation. The Australian

media generally saw this positively, as an act of personal responsibility. For example, High Court judge Michael Kirby was widely praised for this action. By the end of the decade, homosexuality was no longer seen as a moral question in the Australian quality press, and people who took responsibility for their own ways of life ("life choices" in the new terminology) were increasingly reported only if newsworthy for reasons other than their sexuality (though several highly publicised cases did turn on this allegation, such as Jason Donovan vs *The Face*).

To conclude: the cultural context within which defamation law is practised and publicly understood has changed rapidly and radically. The Australian Defamation Project research reported in this paper shows this clearly. The Australian media have become more explicitly anti-"elite" and increasingly vernacular. They speak, not just to, but for, the "ordinary" Australian against the powerful and the rich – against "big" government, "big business" and the professions (including the legal and medical professions). They distrust or affect distrust of the educated expert/mandarin. The media's populism is not so much directed against the state as against all things that proclaim themselves political or self-important (Bell, 1998). Populism in which the media speak against "the elites" is fertile ground for stories where the plaintiff is wealthy, powerful or famous (or all three!). However, it is the soil in which more mundane issues are unlikely to flourish (issues around what constitutes reputation, questions of legal process and reform, ethical or professional practices or incompetence). An index of the changed meaning and significance of defamation is the fact that referring to a person's "character" or "reputation" today sounds quaintly out-of-date. The vocabulary in which reputation now resides is more narrow and limited than previously, if we trust the evidence of the Australian press.

Notes

1. The research discussed in this paper was conducted as part of the National Defamation Project, 2002-2005, principal researchers M. Chesterman, P. Bell; research director R. Baker, hosted by the Communications Law Centre, Sydney.

2. The broadsheet, *The Sydney Morning Herald*, has an average weekday circulation of 217,000, and 367,000 on Saturdays (Audit Bureau of Circulation figures, *The Australian*, October 21, 2004, p. 16). It is regarded as a quality newspaper "of record", and is the oldest Australian news publication. At various times during the period studied for this project, it published opinion

columns by legal experts such as commentator Richard Ackland. Sydney was the site of the Marsden/Channel 7 case, perhaps the most-reported defamation case in Australian history. This case seemed to implicate a significant cross-section of Sydney's most public figures. Hence its high level of newsworthiness. The *Sydney Daily Telegraph* is a morning tabloid paper with a circulation of 400,000 (weekdays) and 332,000 (Saturdays). Its style is populist, visually loud and colourful, and it frequently employs banner headlines in the Australian vernacular. *The West Australian*, published in Perth, has a virtual monopoly in its eponymous state. It sells 206,000 copies on weekdays and 378,000 on Sundays. Its style is a mix of metropolitan tabloid and regional-rural publication. It serves its parochial readership within the context of reporting national news. *The Australian*, the nationally distributed broadsheet, has circulation of 133,000 daily, and 292,000 on weekends.

3. Tables comparing the agendas of the four newspapers studied are available from the author at p.bell@unsw.edu.au.

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